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CURRENT EVENTS.

SUITS IN STATE COURTS AGAINST RECEIVERS APPOINTED IN UNITED STATES COURTS. —A correspondent referring to some remarks of ours on railway receiverships in Federal Courts,[1] complains that he has been denied, by Mr. Circuit Judge Brewer, of the right to bring an action in the State court in Missouri for the killing of a cow by a train of cars operated by the servants of the receivers, of the Wabash railway, appointed by the United States Circuit Court. In denying his application, Judge Brewer is reported, by the official stenographer of the court, to have said: "This is an application for leave to sue the receivers of the Wabash Company for damages for stock. It is one of those cases where I think it should be presented to the master for his determination. I have in one or two instances permitted suits to be brought against receivers in the State court, where the allegation of the petition was that the receivers, in conjunction with several other roads, were jointly in possession of a tract of ground which was claimed by the plaintiff. As to the other defendants, he would have to sue in the State courts, but as it was a joint action against all for the possession of a tract of land, I thought it proper to have that suit brought in the State court. But this claim I think ought to be presented to the master and be paid with less cost. It is a small matter, and if presented to the master will be paid I presume. They have a stock adjuster, and it will be probably adjusted without suit. The costs of suit will be more than the value of the property." Our correspondent contrasts this language with that of Mr. Commissioner Martin, of the Supreme Court Commission of Missouri, in a case heretofore published in this JOURNAL: "The receiver, in his official capacity, is the party liable for the injury complained of. Litigants are not at liberty to sue him when and where they please. A license to do so must first be obtained from the court of which he is an officer. I can hardly doubt that the plaintiff would have received a permission to that effect upon proper application. As these actions under our law are permitted to be brought before justices of the peace in the township where the injury occurred, or in the adjoining township—a provision intended for the benefit of both parties—an application to prosecute his action in statutory form would be manifestly natural and commendatory. It is impossible for a court to take charge of a long line of railway and run it, without incurring along its line the obligations and liabilities imposed upon the proprietors of such property by the laws of the State in which it is operated. Neither could it be operated successfully without the aid and protection of State laws. I believe it is customary to permit liabilities of this character, when incurred by the receiver to be ascertained and determined in the counties in which the facts have transpired giving rise thereto, and according to the form of trial suited to the nature of the liability, the judgment when obtained to be classified and enforced by the court having charge of the property. A rational regard for the rights of all parties concerned, is the foundation for this practice, and I am slow to believe that any court administering an enlightened system of jurisprudence, would refuse to grant all proper orders to that end."[2] With much respect for the opinion of our correspondent, and for that of Mr. Commissioner Martin, we cannot but think that Judge Brewer is right in this matter. The delays in the administration of justice in the State courts of Missouri are so great that it would be quite impossible to wind up speedily such a receivership as that of the Wabash Railway, if the court should grant freely to persons having small claims against the receivers the right to sue them in the State courts. The suit in the Federal court is a suit in equity, and the jurisdiction of the court of equity over the chief subject-matter of the controversy draws to it the jurisdiction to settle all subsidiary matters by its own officers and its own processes. Trial by jury is not a part of these processes, except where it is resorted to for convenience in order to advise the conscience of the chancellor upon some difficult question

[1] Ante, p. 2.

[2] Heath v. Missouri, etc. R. Co., 20 C. L. J. 193.

of fact. Such a mode of procedure is no deprivation of the right of trial by jury granted by the State Constitution, because this right does not extend to cases in equity. Nor is the court under any obligation to grant a jury trial in these cases, *ex debito justiciæ*, since the verdicts of juries in such cases are notoriously unjust and universally against the railroad company. The gentlemen selected by the United States Circuit Court at St. Louis as Masters in Chancery are men of the most unimpeachable records at the bar for honor and integrity, and it cannot be doubted that they will do justice to these small claimants in every case. The same careful purpose to do justice to small suitors has always been manifested on the part of the judges, and the language of Judge Brewer, above quoted, shows that he fully participates in it. We have known of a case where Mr. District Judge Treat sat all day hearing exceptions to a Master's report in one of these damage cases, where the amount in controversy was not greater than the value of the cow in the case of which our correspondent complains, with the anxious purpose of doing the same exact justice to the poor farmer who was the claimant as though he had been a claimant for millions. We are sorry to say that he incurred newspaper ridicule for doing so; but he is the last judge in the world who could be influenced by such ridicule. We have known of cases of this kind, however, where farmers who had suffered losses by the burning of their stacks and the killing of their cattle, brought their witnesses great distances and incurred so much expense, that whether they succeeded or failed, justice was practically denied them; and we do not hesitate to say that, in cases of these small claims of farmers for damages, the Federal Court ought not to require them to employ counsel and bring their witnesses to St. Louis or Kansas City; but it ought to send a Master to the place where the damage happened, and have him investigate it there in a summary manner, and with the least possible costs to the suitors. We have ventured to express the opinion that the court acted without precedent in appointing receivers in this case on the petition of the debtor, and we do still venture to think that it would have been more seemly for the court to wait until some creditor asked for such relief. But in denying these claimants the right to sue in the State courts, we think the court is pursuing the only course which is admissible under the circumstances.

INDEXING BY ALPHABETICAL PROGRESSION.—Mr. Hemming, Q. C., the editor of the English Chancery Reports (by which we mean those reports which are cited "Ch. Div."), has lately given some ideas concerning reporting in the *Law Quarterly Magazine*, in which he defends the system of indexing by "alphabetical progression." "I believe," he says, "that the time required in consulting the so-called digest might be considerably diminished and absolute certainty of finding the case sought for more nearly approached if alphabetical arrangement were carried much further into subordinate classes." And again, "facility of reference demands alphabetical progression in every class and subclass into which the subject may be grouped." Our experience with the subject of indexing leads us to believe that Mr. Hemming is entirely right in this view. The analytical system of indexing would be the best if all men's minds were analytical, and if all men analyzed the titles and sub-titles of the law in the same way. But as this is not the case, and never can be, the proper system of indexing is to group the entries under the titles, or catch-words, under which the searcher would be most likely to look for them. There should be an alphabetical progression, as far as possible, not only in the leading titles, but also in the sub-titles and in the entries.

NOTES OF RECENT DECISIONS.

EVIDENCE. [OPINIONS.]—OPINIONS OF WITNESSES CONCERNING THE SUFFICIENCY OF A FENCE, WHEN NOT ADMISSIBLE.—In *Railroad Co. v. Schultz*,[3] the Supreme Court of Ohio hold that it is error to permit witnesses who show no other qualification as experts than the fact that they have seen a fence,

[3] 14 Weekly Law Bulletin, 76; s. c. 43 Ohio St.

to testify concerning its goodness and its sufficiency to turn stock. In the opinion of the court, which is given by Owen, J., many cases are reviewed.[4] At the conclusion the learned judge submits the follow propositions as fairly reflecting the current of authority on the subject: "1. That witnesses shall testify to facts, and not opinions, is the general rule. 2. Exceptions to this rule have been found to be, in some cases, necessary to the due administration of justice. 3. Witnesses shown to be learned, skilled, or experienced in a particular art, science, trade, or business, may, in a proper case, give their opinions upon a given state of facts. This exception is limited to experts. 4. In matter more within the common observation and experience of men, non-experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinions from such facts, where such opinions involve conclusions material to the subject of inquiry. 5. In such cases the witnesses are required, so far as may be, to state the primary facts which support their opinions. 6. Where it is practicable to place palpably before the jury the facts supporting their opinions, the witnesses should be restricted, in their testimony, to such facts, and the jurors left to form their opinions from these facts, unaided by the mere opinions of the witnesses. 7. As the warrant for the admission of the opinions of witnesses as evidence is found in some exception to the general and very salutary rule which requires that only facts be stated to the jury, it is the duty of a reviewing court to see that the admission of mere opinions as evidence is within some one of the established exceptions to such general rule; and where it does not appear upon the whole record, but that the jury was equally capable with the witnesses of forming an opinion from the facts stated, it is error to admit in evidence the opinions of witnesses."

HABEAS CORPUS. [CONSTRUCTIVE IMPRISONMENT.]—LIES ONLY IN CASE OF ACTUAL RESTRAINT OR IMPRISONMENT.—In *Re* Wales,[5] charges were preferred against the petitioner, a medical director in the Navy, and he was by a written order of the Secretary of the Navy placed under arrest and ordered to confine himself to the city of Washington, pending his trial by a court martial, which was convened for that purpose. He applied to the Supreme Court of the District of Columbia for a *habeas corpus* to discharge him from this imprisonment, but the court (Wylie and James, J.J.) refused to grant the relief on the ground that he was not undergoing that actual restraint or imprisonment which a person must be undergoing in order to have relief by this writ. Mr. Justice Wylie reasoned[6] that the restraint which is necessary to entitle a person to a writ of *habeas corpus* must at least be such restraint as would be a ground for an action for a false imprisonment, which this restraint was not; since the petitioner had the physical power to go where he pleased. The decisions is a salutary one. The great "writ of liberty," as the writ of *habeas corpus* has been called, has been frequently perverted into a means of "testing" constitutional questions, and determining the validity of municipal ordinances and of getting decisions from the courts in advance of the regular process of law. The sound rule is that it issues only in cases of actual and involuntary restraint.[7] It does not, for instance, extend to the relief of prisoners confined for debt who have been admitted to the jail limits,[8] or who have been released on bail,[9] or on their own recognizance.[10] Nor, where an unconditional pardon has been granted to the prisoner, will a court gratify his desire to save his honor by granting this writ for the purpose of testing the validity of his sentence.[11]

[4] Crane v. Northfield, 33 Vt. 126; Com. v. Sturtevant, 117 Mass. 122: Bliss v. Wilbraham, 8 Allen, 564; Montgomery v. Scott, 34 Wis. 345; Kelley v. Fond du Lac, 31 Wis. 179; Griffin v. Willow, 43 Wis. 509; Veerhusen v. Railway Co., 53 Wis. 689; Enright v. Railway Co., 33 Cal. 230; Sowers v. Dukes, 8 Minn. 23; Clark v. State, 12 Ohio 483; Steamboat Clipper v. Logan, 18 Ohio 375; Stewart v. State, 19 Ohio 202; Protective Ins. Co. v. Harmer, 2 Ohio St. 457; Stillwater Turnp. Co. v. Coover, 26 Ohio St. 520.

[5] 13 Wash. Law Repr. 434.

[6] On the authority of Selwyn's N. P. 915, and Johnson v. Tompkins, Balwin, 601.

[7] Norwood v. Martin, 3 Harr. & J. (Md.) 199.

[8] Metcalf v. Striker, 31 N. Y. 257; Matter of Lampert, 21 Hun. (N. Y.) 154; Dodge's Case, 6 Mart. (La.) 569.

[9] Territory v. Goff, McCahon, (Kan.) 152; *Ex parte* McGehan, 22 Ohio St. 442, 446.

[10] State v. Buyck, 1 Brev. (S. C.) 460; *Contra*, Com. v. Ridgeway, 2 Ashm. 247. See also, Com. v. Chandler, 11 Mass. 83.

[11] *Re* Callicott, 8 Blatchf. 89.

OF THE PURCHASER'S RIGHT TO A GOOD TITLE AND HOW IT MAY BE WAIVED.

A party offering an estate for sale, without qualification, asserts in fact that it is his to sell, and, consequently, that he has a good title,[1] and undertakes, in the absence of express stipulation, to make over to the purchaser the complete and absolute dominion of the soil, saving, of course, the ultimate rights of the Crown. And, inasmuch as land is not the subject of actual manual delivery, as are personal chattels, the vendor is bound to produce such evidence of ownership as will satisfy the purchaser that he has the right to transfer to him all the legal and equitable interests in the land. In Hiern v. Mill,[2] Lord Eldon said that "land is held not by possession, but by title; not so as to personal chattels; for the common traffic of the world could not go on. Therefore a sale in market overt changes the property of a chattel; and that rule, that possession is the criterion of title to a chattel, has been adopted in the Bankrupt Acts: so that, if the owner has permitted the bankrupt to be the visible proprietor the property is divested; for no one can distinguish the property except by the possession. But that is not so as to land; for no person in his senses would take an offer of a purchase from a man, merely because he stood upon the ground. It is not even *prima facie* evidence. He may be tenant by sufferance, or a trespasser. A purchaser must look to his title; and if, being asked for his deeds, he acknowledges he has not got them, the purchaser is bound to further inquiry."

The purchaser's right to a good title does not arise out of the agreement itself, though it may be restricted thereby, but is a right given by law.[3] And it is his right to insist that the question whether the vendor has, or has not, a good title, shall be sifted to the bottom before he can be called upon to accept an indemnity, or compensation for a defect, or to let the vendor off his contract.[4] But where a purchaser had, since the purchase, by his own act, acquired the means of curing a defect in the title, the Court refused to dismiss the vendor's bill.[5] The purchaser may, however, waive his right to a good title by a term of the agreement, or by matters contemporaneous with it or happening after it. But any condition limiting the liability of the vendor in this respect, being in derogation of the purchaser's right, will be strictly construed. "If a vendor means to exclude a purchaser from that which is a matter of common right, he is bound to express himself in terms the most clear, and unambigious, and if there be any chance of reasonable doubt, or reasonable misapprehension of his meaning, I think that the construction must be that which is rather favorable to the purchaser than to the vendor."[6]

The right to demand a clear title is sometimes limited by a condition that the purchaser shall take such title as the vendor has,[7] or some particular title described in the condition; or in some other way the purchaser's right to inquiry is limited,[8] and such stipulations are valid and will, in general, bind the purchaser.[9] But they are construed strictly in his favor, and he must be clearly shown to have deprived himself by contract of his right; otherwise, such conditions will be impotent. The cases in which his right is abridged have been divided into two classes: "First, cases in which the terms of the contract preclude the purchaser from making requisitions upon the vendor as to his title; and secondly, cases in which they preclude him, not only from making enquiries from the vendor as to his title, but from making any investigation anywhere about the title."[10]

In cases falling within the first class, though the purchaser cannot make requisitions upon the vendor, he is at liberty to show *aliunde* that the vendor cannot make a good title. Hence, in Jones v. Clifford,[11] where the condition was that the purchaser "should not require the production of, or investigate, or make any objection in respect of the prior title" — a point of commencement having

[1] Freme v. Wright, 4 Madd. 365.
[2] 13 Ves. 122.
[3] Ogilvie v. Foljambe, 3 Mer. 53.
[4] Knatchbull v. Grueber, 3 Mer. 137.
[5] Hume v. Pocock, L. R. 1 Eq. 662.
[6] Per Sir J. L. Knight Bruce, V. C., in Symons v. James, 1 Y. & C. C. C. 490.
[7] Hume v. Pocock, L. R. 1 Eq. 423; 1 Ch. 379.
[8] Monro v. Taylor, 8 Ha. 51, 71; Corrall v. Cattell, 4 M. & W. 734; Taylor v. Martindale, 1 Y. & C. C. C. 658.
[9] Freme v. Wright, 4 Madd. 365.
[10] Jones v. Clifford, L. R. 3 Ch. D. 790.
[11] *Supra.*

been fixed by the contract—the purchaser was not precluded from showing that the vendor had no title to the fee, which was in fact in the purchaser subject to a lease to the vendor.[12] So, where the parties agreed that the vendor (a lessee) should "not be obliged to produce the lessor's title," it was held that, though the vendor was relieved from showing the title of his lessor, the purchaser was not prevented from taking objections which he had discovered himself.[13] And where the vendor represented the property to be sold as "freehold," it was held that the purchaser was not bound to take an incumbered freehold title, notwithstanding a condition that he should not investigate or take any objection to the title.[14]

But in cases falling within the second class the purchaser is absolutely precluded from enquiry. So, where an agreement by a lessee to sell two leases "as he holds the same" bound the purchaser to accept a proper assignment without requiring the lessor's title, it was held that he was not at liberty to object to the lessor's title.[15] And where the purchaser of a term agreed that "the lessor's title will not be shown, and shall not be enquired into," it was held that enquiry was precluded for every purpose, and he was debarred from showing by Acts of Parliament that the lessors had no power to grant leases.[16] So, by an agreement that the purchaser is to take such title as the vendor has received,[17] or to take his title without dispute,[18] the purchaser is precluded from raising any objection to the title.

The implied right to a clear title may be rebutted by other circumstances. "Where the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor could not give a good title. If the vendor before the execution of the contract said to the purchaser, I cannot make out a perfect title to the property, that notice would repel the purchaser's right to require a good title to be shown. But, if the contract expressly provides that a good title shall be shown, then, inasmuch as a notice by the vendor that he could not show a good title would be inconsistent with the contract, such a notice would be unavailing, and whatever notice of a defect in the title might have been given to the purchaser, he would still be entitled to insist on a good title.[19]

It is frequently made a condition of the agreement, that if the purchaser shall insist on any objection to the title or conveyance which the vendor shall be unable or unwilling to remove, he shall be at liberty to rescind the contract and return the deposit without interest, costs, or further compensation. Various forms of the condition, differing but little in effect, will be found in the reports of the cases cited below.

This stipulation, though not unreasonable, illegal, or improper,[20] is for the sole benefit of the vendor, and is introduced for the purpose of protecting him against difficulties as to title,[21] and is therefore construed strictly in favor of the purchaser.[22]

The vendor cannot take advantage of it if he has knowingly entered into the contract with a defective title; and in such a case the purchaser was held entitled to specific performance with compensation.[23] So, where a termor agreed to sell the fee, and attempted to take advantage of such a condition on discovery of the want of title by the purchaser, it was held he could not do so, and the purchaser was held entitled to damages.[24] For equity will compel a vendor to perform as much of his agreement as he is able.[25]

Notwithstanding this condition, the vendor

[12] See also Darlington v. Hamilton, Kav 550
[13] Shepherd v. Keatly, 1 Cr. M. & R. 117.
[14] Phillips v. Caldcleugh, L. R. 4 Q. B. 159.
[15] Spratt v. Jeffery, 10 B. & C. 249. This case seems to conflict with Shepherd v. Keatly, *supra*, which is said by Sir Edward Fry (Fry, Sp. Perf. 561) to overrule it; but in Duke v. Barnett, 2 Coll. 337, the cases are said to be reconcilable.
[16] Hume v. Bentley, 5 De G. & Sm. 520.
[17] Wilmot v. Wilkinson, 6 B & C. 506.
[18] Duke v. Barnett, 2 Coll. 337.
[19] *In re* Gloag & Miller's Contract, L. R. 23 Chy. Div. 327.
[20] Williams v. Edwards, 2 Sim. 83; Hudson v. Temple, 29 Beav. 543.
[21] Engel v. Fitch, L. R. 3 Q. B. 314.
[22] Morley v. Cook, 2 Ha. 115; Hudson v. Temple, 29 Beav. 543; Greaves v. Wilson, 25 Beav. 290.
[23] Nelthorpe v. Holgate, 1 Coll. 203. But this case was decided upon its own particular circumstances.
[24] Bowman v. Hyland, L. R. 8 Ch. D. 588.
[25] Thomas v. Dering. 1 Ke. 729, and see Wood v. Griffith, 1 Swans. 54; Mortlock v. Buller, 10 Ves. 315; Western v. Russell, 3 V. & B. 192.

must perform all the duties of a vendor, with this sole exception that they must be reasonable. He cannot compel the purchaser to take an imperfect abstract if he can make a complete one.[26] And he must do all that he can to make out his title.[27]

If the vendor is guilty of any wilful misrepresentation,[28] or makes any attempt to defraud or deceive the purchaser,[29] the condition will not protect him; and, generally, any gross negligence or improper conduct is apparently sufficient to deprive the vendor of his right to shelter himself under it.[30] Nor can he avail himself of the condition to improperly escape from the performance of any duty which by the nature of the contract, he is bound to perform.[31] And so, where the condition applied to title or conveyance, and the title was satisfactory, but the purchaser refused to complete until the vendor, a mortgagee, had ousted the mortgagor, which he refused to do, it was held that he could not escape from his contract by giving notice to rescind it under such a condition.[32] And where there was an outstanding incumbrance which the vendor refused to pay off, he was not allowed to rescind.[33] Nor can he make it the means of escaping from a bad sale.[34]

The vendor, it has been said, must, on receiving objections to the title, determine which of two courses he will adopt, namely, whether he will answer the objections, or put an end to the contract altogether; and after having elected to answer the objections he cannot at any time afterwards rescind the contract.[35] But the better opinion is that he cannot annul the contract without attempting to answer the objections.[36] His duty is very concisely and clearly set out by Cairns, L. J., as follows: "First, there must be an objection to the title; secondly, there must be inability or unwillingness on the part of the vendor to remove that objection; thirdly, there must be a communication to the purchaser of the existence of this inability or unwillingness; and fourthly, there must be an insisting by the purchaser on his objection notwithstanding this communication."[37] But even if the purchaser insists upon his objection there must be a certain amount of reasonableness in the vendor's refusal to answer it.[38] The vendor must give the purchaser the opportunity of waiving the objections,[39] for if he waives them the vendor cannot then rescind,[40] and so, where a purchaser filed a bill for specific performance upon receiving, in answer to his objections, a notice of rescission, the Court adjourned the cause in order that the vendor might answer them. The purchaser accepted the title upon receiving the answers, whereupon the Court decreed specific performance with costs.[41] The notice to the purchaser need not give him a time within which to waive his objections.[42]

It has been held that a vendor having once been entitled to the benefit of the condition, may waive his right to avail himself of it by replying to the purchaser's objections,[43] and it is clear that he may waive the right;[44] and so it is prudent for the vendor in answering the objections to reserve to himself the benefit of the condition by apt words.[45] To avert the danger of a waiver of this right the vendor usually adds to his condition the words "notwithstanding any intermediate negotiation," or words having the like effect.[46]

The vendor is protected under this condition from frivolous or untenable objections, or any attempt on the part of the purchaser to compel him to do more than is required of him as his duty under the contract;[47] and so where the purchaser refused to complete when the vendor had done all that he could do, it was held that the vendor might rescind (not

[26] Greaves v. Wilson, 25 Beav. 293.
[27] Hudson v. Temple, 29 Beav. 543, and see Morley v. Cook, 2 Ha. 114; Hobson v. Bell, 2 Beav. 17.
[28] Price v. Macaulay, 2 D. M. & G. 347.
[29] Greaves v. Wilson, 25 Beav. 296.
[30] Turpin v. Chambers, 29 Beav. 104.
[31] Page v. Adam, 4 Beav. 286.
[32] Engel v. Fitch, L. R. 3 Q. B. 314.
[33] *Re* Jackson & Oakshott, L. R. 14 Ch. D. 851.
[34] Greaves v. Wilson, 25 Beav. 296.
[35] Tanner v. Smith, 10 Sim. 411.
[36] Duddell v. Simpson, L. R. 2 Ch. App. 107, and see Roberts v. Wyats, 2 Taunt. 277.
[37] Duddell v. Simpson, L. R. 2 Ch. App. 109.
[38] Greaves v. Wilson, 25 Beav. 295; Duddell v. Simpson, L. R. 2 Ch. App. 107.
[39] Duddell v. Simpson, L. R. 1 Eq. 578; 2 Ch. App. 102.
[40] Greaves v. Wilson, 25 Beav. 290.
[41] Turpin v. Chambers, 29 Beav. 104. And see Greaves v. Wilson, *supra*. But see Williams v. Edwards, 2 Sim. 78.
[42] Duddell v. Simpson, L. R. 2 Ch. App. 102.
[43] Tanner v. Smith, 10 Sim. 410.
[44] Bowman v. Hyland, L. R. 8 Ch. D. 588; Morley v. Cook, 2 Ha. 115.
[45] Morley v. Cook. 2 Ha. 115.
[46] Dart V. & P. 161.
[47] Page v. Adam, 4 Beav. 269. And see Lord v. Stephens, 1 Y. & C. Ex. 222.

having waived his right), though nothing remained to be done but to make payment of the money.[48] But the condition in that case was, that if, from any cause whatever, the contract was not completed by a certain day, the vendor should be at liberty to annul.

The purchaser having, under the contract, a right to have the title strictly investigated, may waive his right by acts subsequent to the contract, either expressly, or by implication; and the waiver may extend to the whole title or to part only; and in case of an express waiver it may be either absolute or conditional.[49]

The question of waiver is one of fact,[50] and the inclination of the court being in favor of the purchaser the vendor must establish to the satisfaction of the court that the purchaser intended to waive, and has waived, his right to object to the title.[51] If there has been fraud or surprise on the part of the vendor, or concealment of a material fact,[52] or if the information supplied to the purchaser has been deficient, as by means of an imperfect abstract,[53] the purchaser will not be allowed to suffer.[54] Where the purchaser's acts are such as to amount to an acceptance of the title as disclosed by the abstract, he is not thereby precluded from showing *aliunde* that the vendor cannot make a title.[55] But, even before delivery of an abstract, if the purchaser chooses to assume the title to be good, or if he act upon his own knowledge or opinion without seeing, or without asking to see, how the title is made out by the vendor, he may be concluded by his acts, especially in Ontario, where titles are comparatively simple, and the formalities of conveyancing practice are not so strictly observed as they are in England.[56] Taking possession and making expensive alterations in a mill and its machinery were held to be an acceptance of the title.[57] The principle is very tersely put by Spragge, V.C., as follows: "Could [the purchaser] reasonably say, if the title turns out not good, I intend to return the property into the hands of the vendors in the State to which I have altered it? If he could not reasonably say this, the alternative seems to me to be, that he must be taken to have intended not to investigate the title."[58] In this case there was also some evidence of the purchaser's prior knowledge of the title. So, acceptance of a title may be implied from writing a letter apologizing for non-payment of the purchase money,[59] for until the title is approved the purchaser is not, in general, bound to pay the purchase money. Taking possession, paying part of the purchase money, giving security for the balance, and mortgaging her interest in the land, were held to bind the purchaser as an acceptance of title.[60] But payments are no waiver where the contract contemplates immediate possession, and provides for payment by instalments.[61] Giving a mortgage for purchase money, and taking a release of dower from the mother of infant heirs were accepted as evidence of approval of the title of the heirs.[62] So, building on the land, asking twice for a conveyance, and offering a note for the purchase money are acts of waiver.[63] Delay in making requisitions on title after delivery of the abstract (the purchaser being in possession), and only requiring production of the deeds after notice by the vendor to complete the purchase concluded the purchase as to the title abstracted;[64] and even silence may be similarly construed.[65] But where property was purchased by persons who dissolved partnership before acceptance of title and made a division of the land between them, it was held that this did not relieve the vendor from his obligation to make a good title.[66]

Attempting a re-sale of the property is an important element for consideration in deter-

[48] Hudson v. Temple, 29 Beav. 543.
[49] Fry, Sp. Perf., § 1302.
[50] Burroughs v. Oakley, 3 Swanst. 168.
[51] Blacklow v. Laws, 2 Ha. 47; Commercial Bank v. McConnell, 7 Gr. 327, 328; O'Keefe v. Taylor, 2 Gr. 307.
[52] Bousfield v. Hodges, 33 Beav. 90.
[53] Blacklow v. Laws, 2 Ha. 40.
[54] Jenkins v. Hiles, 6 Ves. 655.
[55] Warren v. Richardson, 1 You. 1; Bown v. Stinson, 24 Beav. 631; Denison v. Fuller, 10 Gr. 498.
[56] Commercial Bank v. McConnell, 7 Gr. 331.
[57] Commercial Bank v. McConnell, 7 Gr. 323.
[58] P. 331; and see Cutter v. Simons, 2 Mer. 103. But the acts must be very strong. See Osborne v. Harvey, 1 Y. & C. C. C. 116.
[59] Margravine of Anspach v. Noel, 1 Mad. 310; McDonald v. Garrett, 8 Gr. 290.
[60] Haydon v. Bell, 1 Beav. 337.
[61] Darby v. Greenlees, 11 Gr. 353.
[62] McDonald v. Garrett, 8 Gr. 290.
[63] Denison v. Fuller, 10 Gr. 498.
[64] Pegg v. Wisden, 16 Beav. 239.
[65] Rae v. Geddes, 18 Gr. 222.
[66] Darby v. Greenlees, 11 Gr. 353, 354.

mining upon implied acceptance of title.[67] An actual or attempted disposal of a portion of the property does not preclude the purchaser from showing that that portion is essential to the enjoyment of the whole and insisting upon title being made thereto, especially if the treaty for a title has continued;[68] but a sale of a portion of the property in small lots, and cutting timber thereon, if an acceptance of title, cannot be relied upon as such if the vendor subsequently, on demand therefor, delivers an abstract; and he will be bound to verify the abstract.[69] If the vendor in such a case intends to rely on the purchaser's acts of waiver he should take advantage of them at once. By delivering an abstract thereafter, and answering requisitions, he admits that the question of title is still open.[70]

It has been said that taking possession is a waiver of objections to title; that the purchaser proceeds upon the supposition that the contract will be executed; and that he therefore agrees that from the day of taking possession he will treat it as executed.[71] But the mere taking possession is in itself an equivocal act,[72] and is not necessarily a waiver of the right to an inquiry. The court must be satisfied that it was the intention of the purchaser to take the land without such inquiry.[73] And the act of taking possession is more lightly regarded in Ontario than it would be in England, where contracts of sale and investigations of title are conducted with more care and solemnity than in this Province.[74]

If possession is taken, not under the contract, nor by permission of the vendor, but forcibly, that is regarded as such an assumption of the right of property by the purchaser, irrespective of the state of the title, as amounts to a declaration on his part that nothing more remains to be done but the execution of the conveyance; and the purchaser will be taken to have accepted the title.[75] If possession be taken after delivery of the abstract, and no provision as to possession is made by the contract, it lies on the purchaser to rebut the presumption that he has accepted the title as abstracted.[76]

But where possession is taken in pursuance of the terms of the contract;[77] or, the contract being silent, possession is taken prematurely by consent of both parties;[78] or where the court is otherwise satisfied that possession is taken without the intention on the part of the purchaser to waive his right, and the vendor so understands it;[79] the purchaser's right to a good title is not impaired.[80] Where an agreement for sale of building lots contained a stipulation that the purchasers might occupy and enjoy the property until default made in paying the purchase money, and the purchasers entered and erected two workshops on the land, it was held that they had not waived their right to an inquiry.[81] So, where the purchasers, who were railway contractors, having a right by statute to take possession compulsorily, independently of any contract with the owner, took possession under a contract and commenced work on the land, it was held, on a bill filed by them for specific performance, that they were entitled to a reference as to title.[82]

Where the purchaser at a judicial sale takes possession without leave of the court, though with the consent of the parties, he impliedly accepts the title;[83] but if an abstract be subsequently delivered the vendor re-opens the question of title.[84]

If a purchaser lays the abstract before counsel who approves the title, his approbation cannot be taken, as against the purchaser, as a waiver of all reasonable objections.[85] And where a case was submitted to counsel for his opinion as to the sufficiency of

[67] Simpson v. Sadd, 4 D. M. & G. 673.
[68] Knatchbull v. Grueber, 1 Madd. 170.
[69] Gordon v. Harnden, 18 Gr. 231.
[70] Aldwell v. Aldwell, 6 P. R. 183.
[71] Fludyer v. Cocker, 12 Ves. 27. And see Fleetwood v. Green, 15 Ves. 594, explained in Burroughs v. Oakley, 3 Swan. 165.
[72] Simpson v. Sadd, 4 D. M. & G. 672.
[73] Micheltree v. Irwin, 13 Gr. 542.
[74] Micheltree v. Irwin, 13 Gr. 541; O'Keefe v. Taylor, 2 Gr. 307.
[75] O'Keefe v. Taylor, 2 Gr. 307.
[76] Bown v. Stinson, 24 Beav. 631.
[77] Dixon v. Astley, 1 Mer. 134; Stevens v. Guppy, 3 Russ. 171.
[78] Vancouver v. Bliss, 11 Ves. 458, 464; Burroughs v. Oakley, 3 Swan. 159.
[79] Micheltree v. Irwin, 13 Gr. 544.
[80] O'Keefe v. Taylor, 2 Gr. 308; and see Crooks v. Glenn, 8 Gr. 239.
[81] Darby v. Greenlees, 11 Gr. 351.
[82] Jackson v. Jessup, 6 Gr. 156, 159.
[83] Patterson v. Robb, 6 P. R. 114.
[84] Aldwell v. Aldwell, 6 P. R. 183.
[85] Deverell v. Lord Bolton, 18 Ves. 514; and see Stewart v. Alliston, 1 Mer. 33.

the evidence of an alleged intestacy, and it was therein stated that various other objections to the title had been waived or removed, it was held that the purchaser was not thereby obliged to relinquish his right to a reference on the whole title.[86]

The preparation of the conveyance by the purchaser may be an important fact, as amounting to evidence that the parties have arrived at a stage of proceedings subsequent to the question of title; but that fact alone is apparently not sufficient to exclude the purchaser's common equity to an' enquiry.[87] In one case the vendor had prepared and executed a conveyance and retained it in a place of safety. He threatened to convey the land to a stranger and then leave the Province, and the purchaser thereupon declared in writing, in the presence of witnesses, that he intended to secure possession of the conveyance and register it. He subsequently did so. It was held under the circumstances that he had not waived his right to an inquiry.[88] Where a purchaser accepts a conveyance from one of several whose titles are identical, he will be concluded as to the titles of all.[89] But acceptance of a conveyance from one tenant in common is no waiver of the right to an inquiry as to the title of the others, for they may have derived title from different sources.[90]

Where the question is as to waiver of a particular objection only, it must be shown that it was brought to the knowledge of the purchaser; for, waiver being a question of intention, it could not be argued that the purchaser intended to waive that of which he had no knowledge. But if he takes possession, either he or his solicitor clearly knowing the objection to the title, but neither of them giving any intimation of it, he waives the objection,[91] and can never set it up again unless entitled to do so by some act of the vendor's.[92]

The nature of the objection is a matter of importance- If it be of such a nature that it cannot by possibility be cured, the purchaser should immediately insist upon it and refuse to proceed further with the contract; otherwise, he may bind himself to complete the contract. So, where an estate of seventy acres was described in the particulars as freehold with leasehold adjoining, and it appeared that only eight acres were freehold; but the purchaser, having acquired knowledge of this, went on to treat as to the title, and the vendor cleared up all objections; it was held that the purchaser was bound to complete the purchase.[93] And where a purchaser was under contract to buy an estate, which he learned for the first time from the abstract to be subject to a right of sporting over it, and went into possession, it was held that he was concluded by his act and could not avail himself of the objection.[94]

But if the objection is one that may be cured, it will be matter for enquiry whether the purchaser committed the alleged acts of waiver in the expectation that the objection would be removed;[95] and the continuance of negotiations is strong evidence that a purchaser did not intend to waive the objection, for a man by going on to treat does not waive an objection which he is continually insisting upon.[96]

What amounts to taking possession was discussed in a late case.[97] It was there laid down that the delivery of the key of a house is not of itself delivery of possession; it is but a symbolical delivery, but may be evidence of possession, if given or received with that view. In the same case it was held that letting the purchaser into receipt of rents and profits was not a compliance with the condition to give possession of one parcel, where another condition provided for letting the purchaser into the receipts of the rents and profits of another parcel.—*Canadian Law Times.*

[86] Lesturgeon v. Martin, 3 Myl. & K. 255.
[87] Burroughs v. Oakley, 3 Swan. 171.
[88] Mitcheltree v. Irwin, 13 Gr. 538, 540.
[89] McDonald v. Garrett, 8 Gr. 293.
[90] McDonald v. Garrett, 8 Gr. 292.
[91] Burnell v. Brown, 1 J. & W. 175.
[92] Burnell v. Brown, 1 J. & W. 174; Aldwell v. Aldwell, 6 P. R. 183; Gordon v. Harnden, 18 Gr. 231.
[93] Fordyce v. Ford, 4 Bro. C. C. 495; cited in Drewe v. Hanson, 6 Ves. 679.
[94] Burnell v. Brown, 1 J. & W. 168; and see Ogilvie v. Foljambe, 3 Mer. 53.
[95] Calcraft v. Roebuck, 1 Ves. Jr. 225.
[96] Knatchbull v. Grueber, 1 Mad. 170.
[97] People's Loan & D. Co. v. Bacon, 27 Gr. 294.

COLOR OF TITLE.

HOLBROOK v. FORSYTHE.*

Supreme Court of Illinois, Ottawa, October 14, 1884.

LIMITATION. [*Adverse Possession-Color of Title.*]-*Devise in Words of General Description.*—A devise of all the lands in a particular State *belonging* to the testator does not give to the devisee color of title in respect of those lands in the particular State, to which the devisor had not a good title, but only color title.

Appeal from the Circuit Courtt of Cook county; the Hon. KIRK HAWES, Judge, presiding.

Mr. Edmund S. Holbrook, *pro se:*

The devise to Maurice Wakeman was not color of title, as it did not purport, on its face, a pass any land except such as belonged to the testator. Like a deed, it must purport on its face to convey the land claimed. Shackleford v. Bailey, 35 Ill. 392; Bride v. Watt, 23 Id. 507; Stearns v. Gittings, 19 Id. 385; s.c. 23 Id. 387; Dunlap v. Daugherty, 20 Id. 397; Bickenson v. Breeden, 30 Id. 325; Sedgwick, and Wait on Trials of Real Property, Sec. 767, *et seq.*

How little chance for a devise of interest in general words, without any description of any land, will constitute color of title to a specific tract of land, see Wood v. Bank, 14 N. H. 101; Bride v. Watt, 23 Ill. 507; Rigor v. Frye, 62 Id. 508; Busch v. Hustin. 75 Id. 343.

Mr. W. C. Goudy, for the appellees:

A general description of all the grantor's lands in a particular State, county or city, is good. Prettyman v. Walston, 34 Ill. 191; Doty v. Wilder, 15 Id. 411; Bird v. Bird, 40 Maine, 403; Harmon v. James, 7 S. & M. 118; Jackson v. De Lancy, 11 Johns. 366.

As to what is good color of title, see Hassel v. Ridgely, 49 Ill. 197; Holloway v. Clark, 57 Id. 423; Payne v. Markle, 89 Id. 66; Bride v. Watt, 23 Id. 507; Waterhouse v. Mariin, Peck, (Tenn.) 409; Callender v. Sherman, 5 Ired. L. 711; Henley v. Wilson, 81 N. C. 405; Wright v. Mateson, 18 How. 59; Bemal v. Gleim, 33 Cal. 676; McCall v. Neeley, 3 Watts, 72; Teabout v. Daniels, 38 Iowa, 161; McConnel v. Street, 17 Ill. 253; Brooks v. Bruyn, 35 Id. 394.

Mr. Justice Mulkey delivered the opinion of the Court:

This case is now before us on the third appeal, and was once considered on a petition for a rehearing, so that if it is not by this time pretty well understood, it is not likely to be. A full statement of the facts will be found in 99 Ill. 312, being the report of the case when last before us. Since then the appellant has taken a new trial under the statute, and the trial court having reached the same conclusion from which the last appeal was taken, appellant again asks a reconsideration of the case in this court.

With one exception the facts are substantially the same as they appear in the report of the case above referred to. The defence now, as heretofore, is based upon the Limitation act of 1839. The trial court held that the defence was sufficiently made out, and consequently gave judgment for the defendants. On the present appeal we propose to discuss but a single question, namely, the sufficiency of the color of title as presented by the present record.

On the former trial, color of title was clearly shown by the introduction of the unrecorded deed from Egan to Wakeman of the 7th of July, 1836, and connecting appellees with it by the introduction of Wakeman's deed of the 29th of June, 1869, to Thomas Lord, and the latter's conveyance of January 12, 1871, to Eliza Forsythe. On the last trial, however, after appellees had shown color of title to Wakeman, and connected themselves with it in the manner just stated, appellant, by way of rebuttal, showed that Maurice Wakeman, on the 26th of April, 1837, conveyed the premises to Ebenezer Dimon, J., whereby Wakeman was divested of his color of title. To meet this state of case, appellees then showed that Dimon, on the 1st of August, 1839, reconveyed the lands in question to Jessup Wakeman, who died in 1844, leaving a will, which was admitted to probate at Fairfield, Conn., on the 1st of June of that year, containing, among others, this provision: "I give and bequeath to my son, Maurice Wakeman, his heirs and assigns, all the real estate and lands to me belonging and being in the State of Illinois." Under this provision of the will it is contended by appellees that Maurice Wakeman became again invested with color of title to the lands in controversy, and that his subsequent payment of taxes under it, for the requisite number of years, made out a case under the statute.

If one wills or conveys to another all lands belonging to him in a particular county or State, the deed will clearly pass to the devisee or grantee the title of the former to all such lands as belonged to the testator or grantor in such county or State at the time the instrument of conveyance took effect. But it is contended by appellant, that where, in such cases, no particular lands are described, and the instrument can only be given effect by showing, as an extrinsic fact, that the grantor or testator actually owned the particular tract or tracts of land claimed to pass by it, a mere contingent or inchoate right not coming within the general description of *lands owned or belonging to the testator or grantor*, will not pass by it. It must be conceded there is much force in this position. By the express terms of the devise to Wakeman it is limited to the "real estate and lands" *belonging to him* in the State of Illinois. It is conceded that the lands in dispute did not at the time this will took effect, nor, indeed, at any other time, so far as the record shows, belong to the testator. The utmost that is claimed is, that he had color of title to it. If the will had given

* S. C., 112 Ill. 306, (Adv. Sheets.)

Wakeman all the lands which the testator claimed to own or had deeds for, or color of title to in the State of Illinois, these lands could clearly have been shown to come within the description, Or, if the lands devised had been specifically designated as in the government survey, or in any other appropriate way by which they could have been identified, it is clear enough any right connected with the lands, including color of title, would have passed by the devise. On the same principle, if one having color of title, only, to a particular tract of land, conveys it by a specific description, the color of title will pass by his deed. In like manner, if one having only color of title dies intestate, such color of title will descend to his heirs at law. All these cases are clear enough, and well understood. But the case in hand is unlike any of the ones suggested. Here, as already seen, the will does not specifically describe any lands, and to give it operation as to any particular tract in the State, as is sought to be done here, it must be shown, unless we depart altogether from the words of the instrument, that such particular tract *belonged* to the testator at the time of his death. The will clearly does not purport to give any other kind or description of lands, and it would certainly be extending judicial construction to its utmost limits to say this description includes a particular tract of land that is conceded to have never belonged to the testator. This we are not prepared to do.

After a careful consideration of the question, we are satisfied appellees failed to satisfactorily establish color of title in Wakeman, and that the defense consequently failed. Such being the case, the defense insisted upon cannot prevail against any one who may have the paramount title.

The judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

MR. JUSTICE DICKEY: I concur in the views above expressed, but would prefer to rest the judgment upon another ground, in which I feel more confidence. I think when this case was here, and passed upon in the case reported in 99 Ill. 312, the decision was wrong. I think when a new trial is taken under the statute, it sets aside all previous proceedings on the former trial, and entitles each party to a hearing *de novo* on all questions of law as well as of fact which may arise, and that decisions made on or relating to such former trial are not *res judicata*. I think that opinion should be overruled and disregarded, and that the possession relied upon in this case as a basis of defense, under the statute of 1839, is not sufficient to sustain the defense.

NOTE.—The court in the principal case said: (1.) That if the land had *belonged* to the testator, the devisee could have taken under the general description; or, (2,)if the land had been *sufficiently described*, he would have taken the title of his testator, viz.: "color of title." So the point decided is, that to convey "color of title" there must be an accurate description of the land.

Some statutes of limitation for the recovery of real estate expressly provide that, to constitute a bar to the plaintiff's right of recovery at the time limited, the possession must have been taken and held under color of title; sometimes the statute requires the adverse possession to have been taken and held under a title deducible of record from the State to the parties in possession. For instance, in Kentucky, there was one statute limiting the right of action to 20 years; and another to 7 years, where the party in possession had title and an actual residence on the land. Under the former it was held that an adverse possession of 20 years barred an ejectment without any paper title whatever, the statute not requiring it. Henedon v. Wood, 2 A. K. Marsh, 44; Taylor v. Buckner, id. 18; Chiles v. Jones, 4 Dana 483; Bowles v. Sharp, 4 Bibb 550. But under the 7 years limitation it was held that 7 years adverse possession must have been by actual residence under a legal or equitable title. Anderson v. Turner, 3 A. K. Marsh, 133; Poage v. Chism, 4 Dana 54; Robinson v. Neal, 5 T. B. Mon. 214.

The Iowa statute does not require the person in possession to have color of title in order to bar an action by adverse holding; it is sufficient if it was taken and held under a claim of title. Hamilton v. Wright, 30 Iowa, 480, 486; Clagett v. Conlee, 16 id. 487; Jones v. Hickman, 12 id. 101; Wright v. Keithler, 7 id. 92. "The possession will be adverse if had or continued under the claim or color of title, however groundless the supposed title may prove to be." Ford v. Wilson, 35 Miss. 504, 505; Grant v. Fowler, 39 N. H. 104; Fanran v. Fassenden, 39 N. H. 281; Close v. Tanner, 27 Iowa, 503.

Various definitions have been suggested defining the term "color of title." "Color of title is that which in appearance is title, but which in reality is no title." Wright v. Mattison, 18 How. 56. This definition is approved in Edgerton v. Bird, 6 Wis. 527. It is that which the law will consider *prima facie* a good title, but which, by reason of some defect not appearing on its face, does not in fact amount to title. Bernard v. Gleim, 33 Cal. 668, 676. It is said to be anything in writing which serves to define the extent of the claim. Field v. Boynton, 33 Ga. 239, 242. It differs from title only in externals. The substance of both is the same. Thompson v. Cragg, 24 Texas 596. It is wholly immaterial how imperfect or defective the writing may be, considered as a deed, if it defines the extent of the claim, it is a sign, semblance or color of title. Field v. Boynton, 33 Ga. 242; see Ellston v. Kennicotte, 46 Ill. 188; Morrison v. Norman, 47 Ill. 479. Color of title is well defined in Beverly v. Bank, 9 Ga. 444. It is said "to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used—a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law." It means a deed or survey of the land placed upon the record of land-titles, whereby notice is given to the true owner and all the world that the occupant claims the title. Hodge v. Eddy, 38 Vt. 345. Any instrument having a grantor and a grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. Brooks v. Bruyn, 35 Ill. 394; 3 Washb. on Real Prop. 155. Colorable title then, in appearance in title, but in fact is not, or may not be any title at all. It is immaterial whether the conveyance actually passed the title to the property, for that is not the inquiry. Does it appear to do so is the test; and any claim asserted under the provi-

sions of such a conveyance is a claim under color of title. Dickens v. Barnes, 79 N. C. 491. It must be such that there may be a rightful claim of possesion by reason of the supposed title. Russell v. Erwin, 38 Ala. 48. "Color of title" and "claim of title" are not synonymous. To constitute the former a paper title is requisite in the party claiming, but the latter may exist wholly by parol. Hamilton v. Wright, 30 Iowa 480, 486; Clagett v. Conlee, 16 Iowa 487. The deed or instrument which gives color of title need not be in writing. Minot v. Brooks, 16 N. H. 374, 378.

A few illustrations as to what will or will not constitute color of title may be of interest. It has been held that an absolute nullity, as a void judgment, deed, etc., will not amount to color of title. Bernard v. Gleim, 33 Cal. 668; Jackson v. Woodruff, 1 Cow. 276; Jackson v. Frost, 5 Id. 346; Sinclair v. Jackson, 8 Id. 583; Jackson v. Waters, 12 John. 365; Livingston v. Penn Iron Co., 9 Wend. 511. But the rule thus broadly stated is not strictly accurate. That a void deed may be good as color of title has often been decided. Brooks v. Bruyn, 35 Ill. 394; Pillow v. Roberts, 13 How. 472; Ewing v. Burnett, 11 Pet. 54; Lindsay v. Fry, 25 Wis. 460; Beverly v. Brooke, 9 Ga. 440; Hamilton v. Boggess, 63 Mo. 233; Forrest v. Jackson, 56 N. H. 357. A tax-collector's deed is sufficient to constitute color of title. Minot v. Brooks, 16 N. H. 374; Dillingham v. Brown, 38 Ala. 311, 313; Blackwell on Tax Titles, 665 *et seq.*; Hearick v. Doe, 4 Ind. 164; Commelin v. Minten, 24 Ala. 352; Pillow v. Roberts, 13 How. 472; Prescott v. Nevers, 4 Mason, 326; Little v. Megquier, 2 Me. 176, 178; Brackett, Petitioner, 53 Me. 228.

So is an entry by a sheriff on a *fi. fa.* of levy, sale and purchase of land: Watts v. Smith, 19 Ga. 12; or a sheriff's deed, though unaccompanied by the execution: Burkhater v. Edwards, 16 Ga. 593; or a purchase at a sheriff's sale and the payment of the purchase-money, evidenced by the written memoranda and receipt of it: Field v. Boynton, 33 Ga. 239. So in Iowa the heirs of one who held adversely under mere claim of right, are in possession under color of title. Teabout v. Daniels, 38 Iowa, 158. And if the deed under which the party takes possession is absolutely void, yet such possession will enable him to pass color of title to his grantee. Bailey v. Carleton, 12 N. H. 9; Minot v. Brooks, 16 N. H. 377, and cases cited. But a quit-claim or release of all the right, title and interest of one who is not shown to have any color of title or possession is not sufficient: Wood v. Banks, 14 N. H. 101; nor is a possession under a quit-claim deed obtained from a naked possessor without color of title: Jackson v. Hill, 5 Wend. 532; or a bond conditioned for the execution and delivery of a deed upon a compliance with its terms in the future: Rigor v. Frye, 62 Ill. 507; or a certificate of purchase as a tax sale: Bride v. Wall, 23 Ill. 507; or a certificate of a land office, showing that one time a party was entitled to a pre-emption: Spellman v. Curtemus, 12 Ill. 409.

The possessor's claim of title must be in good faith. If he knows the title is bad he cannot claim under color of title, otherwise if he believes it to be good. Minot v. Brooks, 16 N. H. 376; Jackson v. Hill, 5 Wend. 532; Jackson v. Andrews, 7 Wend. 152. The *quo animo* under which it is made furnishes the test. Adam's Ejectm. (Tillinghast's ed.) 53, note; Mattison v. Wright, 18 How. 56. Thus, if the grantee is chargeable with fraud or knows that the deed conveys no title, it will not avail him as color. Moody v. Fleming, 4 Ga. 115; Waterhouse v. Martin, Peck 392; Sexton v. Hunt, 20 N. J. L. 487. As the law presumes all men act in good faith, in the absence of evidence, color of title will be presumed to have been acquired. Brooks v. Bruyn, 35 Ill. 392; Haroin v. Gouverneur, 69 Ill. 140; McMillen v. Erwin, 58 Ga. 427.

In some States color of title cannot arise unless there is a written instrument purporting on its face to convey title to a particular tract of land. Shackleford v. Bailey, 35 Ill. 391; Bride v. Watts, 23 Ill. 507; Rigor v. Frye, 62 Ill. 507; Dickerson v. Breeden, 30 Ill. 279; Morrison v. Norman, 47 Ill. 477; Huls v. Buntin, 47 Ill. 396. But in others it may be created by an act *in pais without writing.* Runnels v. Runnels, 52 Mo. 112; McCall v. Neely, 3 Watts, 69. Many cases hold that color of title may exist without an instrument in writing, if there is a *bona fide* claim of title, and some record or some public and notorious act, such as a survey, in which the precise extent of the claim is defined, and with reference to which the claim is made. McClellan v. Kellogg, 17 Ill. 501; Whiteside v. Singleton, Meigs, 207; Dufour v. Camfranc, 11 Mart. 705; Frederick v. Searlé, 5 Serg. & R. 236; Boyer v. Benlow, 10 Serg. & R. 303; Jackson v. Wheat, 18 Johns. 40; Bell v. Hartley, 4 Watts & S. 32. But a mere intruder cannot extend his possession beyond the limits of his actual inclosure. Bell v. Longsworth, 6 Ind. 273; Van Cleaver v. Milliken, 13 Ind. 105; Sumner v. Stevens, 6 Met. 337; Ashley v. Ashley, 4 Gray, 197; Angell on Lim. 406. And where there is no written instrument "there must be some visible acts, signs or indications, which are apparent to all showing the extent of the boundaries of the land claimed, to amount to color of title to all." Cooper v. Ord, 60 Mo. 431. See further, Woodward v. Blanchard, 16 Ill. 430; Irving v. Brownell, 11 Id. 412; Dunlap v. Dougherty, 20 Id. 404; Bride v. Watts, 23 Id. 507; Dickenson v. Breeden, 30 Ill. 325; Holloway v. Clark, 27 Id. 484; Dawley v. Van Court, 21 Id. 460; Newland v. Marsh, 30 Ill. 376.

There must be apt words for the conveyance of the property. Brooks v. Bruyn, 35 Ill. 392. The description must be sufficiently accurate so as to identify or furnish the means of identifying the land under the maxim, *id certum est quod reddi potest.* Dickens v. Barnes, 79 N. C. 492; Brown v. Coble, 72 N. C. 391; Capp v. Holt, 5 Jones Eq. 153. Thus, land described as "one tract of land lying and being in the county aforesaid, adjoining the land of A & B, containing twenty acres more or less," is insufficient. Dickens v. Barnes, 79 M. C. 490. But a grant of land in the patent of B, and of all other lands belonging to the grantor, in the province of New York, is good. Jackson v. DeLancy, 11 John. 365, 368. So is a conveyance granting land in a particular town or city sufficient to convey color of title. Harmon v. James, 7 S. & M. (Miss.) 11, 118; Pettyman v. Walton, 34 Ill. 175, 191.

The color of title suffices only to give boundary to the possession. It is the adverse possession which shows the title. Minot v. Brooks, 16 N. H. 374, 376. A deed cannot be color of title beyond what it purports to convey. Wood v. Banks, 14 N. H. 111. But possession of part of the land described is sufficient to hold all. Little v. Megquier, 2 Me. 176. It is constructive possession of all not actually occupied. Webb v. Richardson, 42 Vt. 465. The rule also holds good where the land is extensive. Thomas v. Harmon, 4 Bibb, 563; Hicks v. Coleman, 25 Cal. 131-137; French v. Rollins, 21 Me. 372. But where two distinct tracts are purported to be conveyed, the color of title attaches only to that entered upon. Grimes v. Rayland, 23 Ga. 123; 3 Wash on R. P. 155, 156. For further illustration see: League v. Atchinson, 6 Wall. 112; Litchfield v. Johnson, 4 Dill. 551; Field v. Columbert, 4 Sawy. 523; Farley v. Smith, 39 Ala. 38; Tate v. Southard, 3 Hawks, 119; s. c., 14 Am. Dec. 578, 580; Taylor v. Buchnar, 12 Am. Dec. 357, note; Abb. Law Dict., sub. voc. "Color of title."

St. Louis, Mo. EUGENE MCQUILLIN.

RECOVERY BY AGENT WHO HAS PAID A BET FOR HIS PRINCIPAL.

READ v. ANDERSON.

English Court of Appeals, May 30, 1884.

BETS — *Recovery by Agent of Money Paid for Principal, Though after Revocation.* — R. was authorized by A. to make bets for A. in the name of R., and having paid the moneys sued A. to recover the same. *Held*, that though the bets were not recoverable at law against R., and were revoked before paid, yet, having paid them to save himself from being excluded from the ring, R. was entitled to indemnity from A.

This was an action by a turf commission agent to recover from his principal the bets which plaintiff had paid on instructions received from defendant. The Queen's Bench Division gave judgment for the plaintiff. See 47 J. P. 311.

Defendant appealed.

Petheram, Q. C., and *Dale*, for the defendant; *Finlay, Q. C.*, and *MacCall*, for the plaintiff, referred to the following cases; Hampden v. Walsh, 1 Q. B. D. 189; Diggle v. Higgs, 2 Ex. D. 422; Thacker v. Hardy, 4 Q. B. D. 685; Rosewarne v. Billing, 15 C. B. (N. S.) 316.

Cur adv. vult.

BRETT, M. R.—In this case, which was tried before Hawkins, J., without a jury, the plaintiff is a turf commission agent, and he sued the defendant to recover £175, the amount of three bets made by the plaintiff in his own name at the request of and for the defendant, and paid by the plaintiff to the winners. The learned judge has found as to certain questions of fact, but I think this court is not bound by such findings, unless it agrees with the learned judge. We may take it, however, that the defendant speculates on races, and he hired the plaintiff as a commission agent to bet in his (the plaintiff's) own name, and gave him authority to pay and receive the amount of bets won and lost. That is, a contract of principal and agent, not of purchase and sale, and the relation of principal and agent is constituted by the terms on which the parties deal. Those terms are, that the agent is to make bets, and the principal is to pay him commission; that commission is paid for making, not for paying the bets. One of the ordinary powers of a principal is, that he can always revoke the authority before that authority has been acted on. The defendant did revoke the authority before the bets were paid. The plaintiff sues to recover the amount of the bets which he has paid, notwithstanding such revocation. The question is, whether the plaintiff could revoke this authority. Hawkins, J., found that where an agent bets in his own name on behalf of a principal, and does not pay the bets which he loses, he is a defaulter and is turned out of the ring, and cannot carry on his business, and so suffers loss and inconvenience. The question is, whether in such a case the law will imply an undertaking on the part of the principal that he will not revoke the agent's authority to pay the bets. Where authority is given to an agent to do a thing in his own name on behalf of his principal, under such circumstances that if the authority were withdrawn the agent would be bound in law, there it has been held that the principal is not entitled to revoke the authority which he has given to the agent. In the present case, if the agent had declined to pay the bets which he had made and lost, the winners of these bets could not have enforced payment against him, nor could they have enforced it against the principal. If the bets had been decided the other way, the agent could not have enforced payment against the losers, nor could the principal, for the law will not assist any person to recover money won by betting. Here the plaintiff's contention is that he is entitled to enforce payment of the amount of these bets from the defendant, but which the law says shall not be enforced. Otherwise the plaintiff says he would suffer personal inconvenience and loss in business. But it is a business to which the law has an objection, and refuses to enforce. The law cannot rightly take notice of such a business and disregard its inconvenience. For these reasons I am strongly of opinion that the exception to the rule that the principal has the power of revocation must be confined to cases where if the principal were to revoke his authority the agent would be in such a position that the party with whom he had contracted could enforce the contract against him. I therefore think this appeal should be sustained.

BOWEN, L. J.—I am unable to agree with the judgment of the Master of the Rolls. The bets were made, not in the name of the defendant, but, according to custom, in the plaintiff's own name. The defendant purported to revoke the plaintiff's authority to pay the bets, and denied that he was liable to repay to the plaintiff the amount which the plaintiff had paid to the winners. The question is, whether the defendant had a right, after the plaintiff had incurred liability, to retract the commission. As to the delegation of authority, the general rule is, that, unless he is precluded by his conduct or by the terms of the contract, the principal may revoke the authority he has given. But if the plaintiff precludes himself, he cannot revoke the authority, and is bound to indemnify the agent. Here there was a custom known to both parties that a turf commission agent bets in his own name, and becomes responsible to third parties. I am of opinion that the learned judge, in finding that this custom existed, has found according to the evidence. Therefore the defendant in effect agrees to indemnify his agent. I draw the inference from the evidence that it was understood that the defendant was to indemnify the plaintiff. If a merchant in this country employs an agent abroad to insure for him by foreign honor policies which could not be sued on in our courts, the English

principal cannot repudiate his liability, there being an implied guarantee in such a case. Though there is a difficulty arising from the fact that the plaintiff's business is wagering, which the law does not sanction, yet the law does not make the business illegal. The contract in the present case is not a wager; it is not because the horses which he backed for the defendant lost that the plaintiff sues, but because he had to pay the bets, otherwise he was liable to be turned out of the ring, and to suffer loss and inconvenience. Though I hesitate to differ from the Master of the Rolls, yet I am of opinion the judgment here was right.

Fry, L. J.—I also feel doubt in this case owing to the opinion of the Master of the Rolls, but I concur with the conclusion of Bowen, L. J., for the reasons he has given.

Judgment for plaintiff.

NOTE.—The above decision has excited a good deal of comment on the part of the English legal press. Concerning it, the *Justice of the Peace* says: "Notwithstanding the elaborate legislation inaugerated by the Gaming and Betting Acts, and the recent stringent measures against the nuisance of betting offices, there seems to be a corner left which involves some nicety as regards the remedy between some of these persons engaged in betting. Before the year 1845, when the statute of 8 and 9 Vict. c. 109, was passed, we are told that at common law wagers were not illegal, and that actions were constantly brought and maintained to recover money, won upon them. And it is said that the object of that statute was not to render illegal the wagers which up to that time had been lawful but simply make the law no longer available for their enforcement, leaving the parties to them to pay them or not as their sense of honor might dictate. Accordingly the 8 and 9 Vict. c. 109, § 18, enacted that "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void, and no suit shall be brought or maintained in any court of law or equity, for recovering any sum of money or valuable thing alleged to be won upon any wager." The difficulty which has been raised on this enactment is whether the legislature meant to declare that no court shall assist anybody, directly or indirectly, in recovering a wager, or merely meant to prohibit any action directly on a wagering consideration, but left other collateral remedies untouched. Some judges use the expression that the bet may have been merely declared to be void, but not necessarily that it was declared illegal. This makes a considerable difference, especially when one person authorises another to make bets and pay them in his (the agent's) name, and then refuses to reimburse or indemnify the agent. There are many statutes which declare certain acts or transactions null and void, and many nice questions arise as to the effect of such declarations in special circumstances.

"The same section of the Gaming Act, 8 & 9 Vict. c. 109, has been considered in its application to the subject of time bargains on the Stock Exchange, and an important case of Thacker v. Hardy, 4 Q. B. D. 685, was decided in the Court of Appeal. The defendant was a speculator on the Stock Exchange, and employed the plaintiff as his stockbroker, to buy and sell stocks and shares for him. Defendant did not expect nor intend to have to accept actual delivery of what plaintiff bought, or to deliver what plaintiff sold for him, but knowingly ran the risk of so having to accept delivery or to deliver, in the hope and expectation that plaintiff would be able to arrange his sales and purchases so as to render nothing but differences actually payable or receivable by defendant. Plaintiff accordingly made large purchases and sales of stock under contracts between himself and various stockjobbers. The plaintiff knew in making the contracts that defendant would be wholly unable to pay for the stock purchased or to deliver the stock sold. The question was raised in an action whether the plaintiff was entitled to recover from the defendant the balance due on a long series of these transactions. The Court of Appeal came to the conclusion that this transaction was not a contract by way of wagering such as was described in 8 & 9 Vict. c. 109, § 18. Bramwell, L. J., said that time bargains merely were not invalid; an agreement to purchase next year's crop of apples was a most effectual time bargain, but was certainly not an invalid one. If it had been a contract to receive only the differences without any real purchase or sale it would have been a time bargain; but the facts did not show that such was the contract. As Cotton, L. J., said, the gain to the plaintiff in no way depended upon the way in which the differences go. He got his commission in either event. Therefore the element necessary to constitute gaming and wagering was wholly absent.

"In the case of ordinary betting, where a stake is deposited in the hands of a stakeholder is always open to the party depositing to revoke the deposit and redemand the money before it has been paid a way, though after it has been paid away it is too late. Such was the case in Hampden v. Walsh, 1 Q. B. D. 189, and in Diggle v. Higgs, 2 Ex. D. 422."

The decisions of the American courts are quite opposed to the doctrine of the principal case. Thus, in relation to that form of gambling which is called "option dealing"—the nominal buying and selling of grain or stocks for future delivery, where the understanding is that no delivery shall in fact take place,—the American courts uniformly hold, not only that neither of the principal parties to the transaction can recover losses of the other, but also that the broker who is employed by one of the principals to conduct the "deals" for such principal, being privy to wagering contract, cannot recover of him for any losses which such broker may sustain through the failure of the principal to put up the required margins, or otherwise. Irwin v. Williar, 110 U. S. 499; Van Blarcom v. Donovan, 20 Cent. L. J. Ad. xiv; Kent v. Miltenberger, 13 Mo. App. 503; Tenney v. Foot, 95 Ills. 99; Barnard v. Backhaus, 52 Wis. 593; Fariera v. Gabell, 89 Pa. St. 89; Smith v. Bouvier, 70 Pa. St. 325; Lehman v. Strassburger, 2 Wood C. Ct. 554; Sawyer v. Taggart, 14 Bush. 729; "Gambling Contracts," 16 Cent. L. J. 225; Biddle, Stock-brokers p. 112; Dos Passos, Stock-brokers, etc. pp. 674, 715, 130, 131, 102, 110.

WEEKLY DIGEST OF RECENT CASES.

1. APPELLATE PROCEDURE. [*Judgment.*]—*When Appellate Court should Remand for New Trial Instead of Rendering Judgment for Normal Damages.*—In an action for conversion of chattels, tried

by the court without a jury, the court from the facts as found by it decided that plaintiff was entitled to a judgment of $400; on appeal, the general term reversed the judgment, and rendered final judgment for nominal damages only. *Held* error, that the case should have been sent back for a new trial. [In the opinion of the court by Finch, J., it is said: "The appellant, without criticising the propriety of the reversal by the general term insists that it should have been followed by an order granting a new trial, and not by a final judgment for six cents damages. We have so held in a precisely similar case. Ehrichs v. De Mill, 75 N. Y. 374. There the action was tried before a court, without a jury; the facts were all found, and without apparent exception or error in the process; the trial court drew from them the legal inference of a judgment for the defendant; the general term on the contrary, drew an opposite conclusion from the the facts found, and ordered judgment for the plaintiff; and on appeal to this court, while justifying the reversal, we determined that a new trial should have been ordered, and that the rendition of final judgment was a mistake. It was then contended, as it is now, that the rule had already been declared to be that where the facts were found by the trial court without exception or error in the process of their determination, and so the only open question was as to the legal inference to be drawn, the appellate court might draw that inference and render judgment accordingly, But the answer made was that in such a case we could not know that there had not been exceptions or asserted errors in the process of finding the facts, since the respondent, not having appealed, was under no obligation to procure their appearance upon the record, and might very well have deemed their presence immaterial for any legitimate purpose of the appeal. And the rule was declared to be, that wherever the character of the issues framed by the pleading was such that upon a new trial it would be possible for the defeated party to recover, such new trial should be awarded."] *Thomas v. New York Life Ins. Co.*, N. Y. Ct. of App., June 2, 1885; 1 Eastern Reporter, 4.

2. ASSIGNMENT. [*Personal Privilege.*]—*License to Trade with Indians not Assignable.*—A license issued by the government of the United States to trade with Indians, is a personal privilege of a high official character. It is hence not assignable, and the assignment of a part interest in such a tradership cannot furnish a valid consideration for a prommissory note. [Citing Gould v. Kendall, 15 Nebr. 549; S. C. 19 N. W. Repr. 483.] *Hobbie v. Zaepffel*, S. C. Nebr., May 13, 1885; 23 N. W. Repr. 514.

3. BUILDING ASSOCIATION. [*Winding up—Priorities.*]—*When withdrawing Members entitled to Priority.*—The rules of a building society provided that investing members should be allowed to withdraw their money upon giving notice, "provided the funds permit," and also that no "further liabilities shall be incurred by the society till such member has been repaid." The society was ordered to be wound-up, when it appeared that the assets were sufficient to pay the outside creditors, but not sufficient to pay the investing members in full. *Held* (affirming the judgment of the court below), that the rules applied to the relations of the members *inter se*, notwithstanding the winding-up, and that investing members who had given notices of withdrawal before the commencement of the winding-up, but had not been repaid, were entitled to be paid in priority to those who had given no notices of withdrawal. *Walton v. Edge*, House of Lords, Nov. 28, 1884; 52 Law Times Rep. (N. S.) 666.

4. CONTRACT. [*Duress.*] — *Mortgage given by Mother to Protect Son from Criminal Prosecution Invalid.*—When a son had been guilty of embezzlement and his mother made a note and executed a mortgage to the employer from whom he had embezzled, and the court was satisfied that the mother's controlling motive was to protect her son from exposure and prosecution: *Held*, that she was not a free agent and that the note and mortage should be annulled and canceled. The maxim, *In pari delicto potior est conditio defendentis*, does not apply. [We refer to Williams v. Bayley, L. R. 1 H. L. 200, and cite Bayley v. Williams, 4 Giff. 638, as being exactly in point. The learned editor of the *Eastern Reporter* adds the following references: 24 Moak's Eng. Rep. 634; 33 Id. 708; 37 Am. Rep. 833; 41 Id. 190; 29 Alb. L. J. 298.] *Foley v. Green*, S. C. R. I., Jan. 24; 1885; 1 Eastern Repr. 42.

5. DOWER. [*Creditor's Bill.*]—*Does not lie to Subject Dower to Payment of Judgment.*—Courts of equity have, in the absence of statutory provisions, no power to subject a widow's right of dower before assignment to the payment of her judgment debts. The mere neglect or refusal of the widow to have assignment of dower made is not such a fraud upon her creditors as to give jurisdiction to a court of equity. [In the opinion of the court by Matteson, J., it is said: "A widow's right of dower in the real estate of her deceased husband, before assignment, is not an estate, but a mere chose or right in action. Weaver v. Sturtevant, 12 R. I. 537, 539, 540. Being a chose in action, it is not subject to levy and sale on execution. Freeman on Executions, § 185; Nason v. Allen, 5 Me. 479, 481, 482; Gooch v. Atkins, 14 Mass. 378, 381; Waller v. Mardus, 29 Mo. 25, 27; Shields' Heirs v. Batts, 5 J. J. Marsh. 12, 15; Petty v. Malier, 15 B. Monr. 501, 604. The proceedings set forth in the bill did not, therefore, confer any title to the right of dower of the respondent Nancy upon the complainants, or create any lien thereon in their favor, which can afford a basis for relief in equity. The only cases in which a right of dower before assignment has been subjected in equity to the payment of debts, cited by the complainants, or which have come to our notice, are, Davison v. Whittlesey, 1 MacArthur, 163; Tompkins v. Fonda, 4 Paige, 448, and Payne v. Becker, 87 N. Y. 153, 158. The first and last of these rest upon the authority of the second, Tompkins v. Fonda. In this case the chancellor says, that if the widow is in possession or is entitled to an assignment of dower immediately, the want of a mere formal assignment of dower is not considered material. The only authority cited by him to sustain this statement is the remark of the lord chancellor in Duke of Hamilton v. Lord Mohun, 1 P. Wms. 118, 122, which was a suit by the heir against the widow, as the guardian of the heir, for an account of the rents and profits of real estate; and it was held just, that a court of equity, in taking the account, should allow to the widow one-third of the profits for her right of dower. For this purpose, the taking of the account, the lord chancellor did not deem the want of a formal assignment of dower material, the right of the widow to one-third of the profits being the same in conscience, whether her dower had or had not been assigned. The question in the present case, how-

ever, is not one of account, but of jurisdiction. In Greene v. Keene, 14 R. I. this court held, that in the absence of fraud, trust or other ground of equitable jurisdiction, and in the absence of statutory provisions conferring it, courts of equity have no jurisdiction to subject a chose in action of a debtor to the payment of a judgment. We have no such provision in our statutes as existed in New York when Tompkins v. Fonda was decided, upon which the decision of the chancellor in that case apparently rests. 2 N. Y. Rev. Stat. 174, § 39. Unless then there is some distinction to be drawn between a right of dower, before assignment, and other choses in action, or unless the bill sets forth some fact, or facts, of equitable cognizance, the suit cannot be maintained. It has been suggested that a distinction between a right of dower and other choses in action may be found in the fact, that courts of equity have concurrent jurisdiction with courts of law in the assignment of dower. We do not think so. The jurisdiction in equity for this purpose was originally auxiliary only, to that at law. It was resorted to for a discovery of title deeds, or of dowable lands, or to remove some impediment to the widow's recovery at law, or for an account of the mesne profits before assignment, or to ascertain the comparative values of different estates, in which the widow might be entitled to dower, and which might be in the possession of various purchases. Though the jurisdiction in equity has become an independent jurisdiction, concurrent with the jurisdiction at law, it appears to be based upon the fact that the remedy which it affords, is in many cases a better and more convenient remedy than that which exists at law, rather than upon any essential difference in nature between dower rights and other choses in action. Such rights still continue to be legal rights, and courts of equity in exercising jurisdiction over them professedly act upon them as legal rights."] *Mazon v. Gray*, S. C. R. I., Feb. 14, 1885; 1 Eastern Repr. 52.

6. INSURANCE, LIFE. [*Divorce.*]—*Commencement of Suit for Divorce does not Impair Wife's Right as Beneficiary.*—A took out a policy on his wife's life, payable in four years to her if living, and if not living, to himself. He paid the premiums, retained the policy, and received payments made upon it. She was living at the maturity of the policy, but had filed a petition for divorce. The governing statute (Pub. Stat. R. I., Chap. 166 § 21) provided as follows: "Any policy or policies of insurance or part thereof which shall not exceed in the aggregate the sum of $10,000 made by an insurance company on the life of any person and expressed to be for the benefit of a married woman, whether effected by herself or by her husband or by any other person on her behalf, shall inure to her separate use and benefit, independently of her husband and of his creditors and representatives, and also independently of any other person effecting the same on her behalf, his creditors and representatives, and such policy may be sued in the name of the person beneficially interested therein, or in the name of the representative of such person." It was held that, in the absence of fraud or mistake, the insurance money belonged to the wife. [In the opinion of the court by Durfee, C. J., it is said: "We think it is quite clear that under this provision, in the absence of any fraud or mistake, the policy must be taken to have inured to the benefit of the said Annie according to its terms, notwithstanding that it was never delivered to her, but was retained by her husband and was payable to him in case of her death before the time for payment. Her's was the primary right, he having no right if she survived the time for payment. Having survived, her right has become absolute. Indeed the cases go far to show that this would have been the effect without the statute. Landrum v. Knowles, 22 N. J. Eq. 594; Ricker v. Charter Oak Life Ins. Co., 27 Minn. 193, 195; Fowler v. Butterly, 78 N. Y. 68; s. c. 34 Am. Rep, 507; Pilcher v. N. Y. Life Ins. Co., 33 La. Ann. 322, 330. But even if, without the statute, it would be possible for said Volney, he having paid for the policy, to prove a resulting trust in his favor against its terms by oral testimony, we think it would not be permissible under the statute, the statute being so positive and explicit. Any other construction would make the statute a cover for fraud."] *Aetna Life Ins. Co v. Mason*, S. C. R. I., Dec. 31, 1884; 1 Eastern Repr. 25.

7. LIMITATIONS. [*Covenant of Seizin.*] — *When Statute begins to run against an Action for Breach of Covenant of Seizen.*—When land, the paramount title to which is in another, is conveyed with covenant of seizin, the covenant is at once broken, and an action of *assumpsit* for damages for the breach thereof will be barred after six years from the date of the conveyance. [In the opinion of the court, Champlin, J., said: "The only question of importance is whether the statute of limitations has barred the plaintiffs right of action upon the covenant of seizin. The plaintiff claims that the statute does not begin to run until some real and substantial damage has been caused by breach of the covenant; that in this case the plaintiff was evicted in 1870, and the suit was commenced in 1871. On the other hand, it is claimed that the covenant of seizin was broken, if at all, when made, and that more than ten years having elapsed after the date of the deed before suit brought, the right of action was barred. This is stating the time which must elapse after the right of action had accrued, and before suit, much more liberally than the form of the present action warrants. The declaration in this case is *assumpsit* and not covenant, and the action is barred by the lapse of six years. The question has been much discussed both here and in England and much diversity of opinion exists as to the time [when] an action may be brought for breach of such covenant. In this State, since the decision of Matteson v. Vaughn, 38 Mich. 373, it is not an open question. The point was directly involved. Mr. Justice Campbell there says: 'As the covenants of seizin and against incumbrances were at once broken, the statute of limitations at once began to run against them as against all other personal actions, and they were barred many years since. No reason has been suggested upon which they can be taken out of the statute, and we do not perceive how they can be without entirely disregarding its terms. * * * If a party does not choose to investigate his title, or enforce his possession within the period of limitation, he must take the consequences of his own neglect.' Some diligence is required of purchasers in ascertaining the state of their title, so far, at least, as they rely upon personal covenants, and it is presumed, if the plaintiff had investigated his title at any time within ten years from the date of the deed, he would have discovered the existence of the paramount title by which he was ousted, and could immediately have brought his action and recovered the purchase

price."] *Sherwood v. Landon*, S. C. Mich., June 10, 1885; 23 N. W. Repr. 778.

8. ———. [*Damages.*]—*Action for Damages Caused by Railroad Bed.*—With respect to damages to drainage, caused by the road-bed of a railway crossing a plantation, the time for prescription or limitation begins to run, not from the date the road is built, but from the time damage is caused by it. *Heath v. T. & P. R. Co.*, S. C. of La., Opelousas, July, 1885.

9. ———. [*Sheriff.*]—*When Statute Begins to Run in Respect of an Action on a Sheriff's Bond for Non-Payment of Money.*—On December 11, 1878, damages were duly assessed for condemning a right of way over plaintiff's land, and on the following day paid to the sheriff, as required by Code Iowa, § 1244. No appeal was taken from the assessment, but plaintiff refused to receive the money, and sought, by injunction, to restrain the construction of the road, but failed. The sheriff deposited the money in a bank, and on October 5, 1882, the bank failed. The sheriff was elected in 1879 and qualified in January, 1878, by giving bond; was re-elected in 1879, gave bond in January, 1880, and his second term of office expired in January, 1882. On March 20, 1883, plaintiff demanded the money, and brought suit on the bond given in January, 1880, to recover it, on April 5, 1883. *Held*, that the right of action accrued at the expiration of the time allowed for an appeal from the assessment, and that the action was barred. [Extract from the opinion of the court by Rothrock, J.: "In Wood, Lim. § 154, it is said: 'The statute does not begin to run against a sheriff for moneys collected on an execution until a demand has been made upon him therefor, or until he has made a proper return of the execution as required by law, or, if no return has been made, until the lapse of time within which, by law, the return is required to be made.' If this be the law—and it appears to us that it is a fair and just rule—upon principle an execution creditor may maintain an action for money made on execution at any time after the return of the execution is required by law to be made. Upon the same principle the plaintiffs in these cases could have maintained an action against the sheriff for what they now claim, at any time after the expiration of the thirty days allowed for an appeal. But it is claimed that the sheriff, upon his re-election, received the money from himself, and that the rights of the parties should be determined the same as if another person had been elected sheriff, and received this money and gave this bond. It seems to us that would raise a different question. In that case no right of action would exist against the new sheriff until he was elected and qualified. In the case at bar the right of action existed during the first term, and it is very clear to us that his re-election did not arrest the operation of the statute of limitations. And the liability of his sureties cannot be greater than his own. But suppose that it should be conceded that the statute did not commence to run until a demand was made upon the sheriff; and suppose that the sheriff should be re-elected for a number of successive terms, and three years after his last election, which would be one year after the expiration of his last term of office, the plaintiffs should make the demand and bring their action within three years after that, alleging that the money was received by the sheriff some eight or ten years before, and that he had failed to pay it over to the plaintiffs. No person has the right to postpone the operation of the statute of limitations in that manner by failing to make the demand. In Prescott v. Gonser, 34 Iowa, 175, it is said: 'It is certainly not the policy of the law to permit a party against whom the statute runs, to defeat its operation by neglecting to do an act which devolves upon him in order to perfect his remedy against another. If this were so, a party would have it in his power to defeat the purpose of the statute in all cases of this character. He could neglect to claim that to which he is entitled for even fifty years, unaffected by the statute of limitations, thereby rendering it a dead-letter. In such a construction we cannot concur.' See, also, Baker v. Johnson Co., 33 Iowa, 151; Hintrager v. Hennessy, 46 Iowa, 600; Beecher v. Clay Co., 52 Iowa, 140; S. C., 2 N. W. Rep. 1037; First Nat. Bank of Garrettsville v. Greene, 17 N. W. Rep. 86."] *Lower v Miller*, S. C. Iowa, June 6, 1885; 23 N. W. Repr. 897.

10. LOCAL BOARDS. [*County Supervisors.*]—*Decision of County Supervisors, when Conclusive.*—The decision of the board of county supervisors as to the ability of a small-pox patient to pay for his care, nursing, and medical attendance, as well as the amount of compensation to be allowed, is conclusive. [Following People v. Supervisors, 3 Mich. 475, 478.] *Farnsworth v. Supervisors*, S. C. Mich., May 13, 1885; 23 N. W. Rep. 465.

11. MALICIOUS PROSECUTION. [*Probable Cause.*]—*Judgment in Former Suit in Favor of Plaintiff Therein Conclusive, Although Reversed on Appeal.*—In an action for malicious prosecution brought by A against B, a judicial finding in the former action in favor of B and against A by the court of original jurisdiction is conclusive of probable cause, when such finding is not procured by unfair means, even if such finding is reversed on appeal. [In the opinion of the court by Carpenter, J., it is said: "It was early decided in Reynolds v. Kennedy, 1 Wils. 232, that the finding against the plaintiff by the tribunal before which the complaint was made is conclusive evidence that there was probable cause for the complaint, even although that finding was afterward reversed on appeal. This case is cited with apparent approval by Lord Mansfield and Lord Loughborough in Johnstore v. Sutton, 1 Term Rep. 510. The same doctrine has been applied in numerous cases in this country. Whitney v. Peckham, 15 Mass. 243; Cloon v. Gerry, 13 Gray, 201; Palmer v. Avery, 41 Barb. 290; Spring v. Besore, 12 B. Monr. 551; Griffis v. Sellars, 4 Dev. & Batt. 176. In Burt v. Place, 4 Wend. 591, the court carefully examine and expound the doctrine of Reynolds v. Kennedy, and sustain the declaration on the clear ground that it goes beyond the declaration in that case; inasmuch as it alleges that the defendant, well knowing that the plaintiff had a good defense, prevented the plaintiff from procuring the necessary evidence to make out that defense by causing him to be detained a prisoner until the judgments were obtained, and that the imprisonment was for the purpose of preventing a defense to the actions. In this case, however, there is no allegation that the judgments of the justice court were obtained by any unfair means practiced on the part of the defendant. We think the true rule is that a judicial finding by the court of original jurisdiction, not alleged to have been procured by unfair means, must be held to be conclusive on the question of probable cause. There are, indeed, cases which

hold to the contrary, but they are few in number and do not seem to us to be otherwise sufficient to control the general current of the authorities. Goodrich v. Warner, 21 Conn. 432; Mayer v. Walter, 64 Pa. St. 283. It is to be noted that in Virginia the court were divided in opinion on this question. Womack v. Circle, 29 Gratt. 192."] *Welch v. Boston, etc. R. Corp.*, S. C. R. I., Dec. 31, 1884; 1 Eastern Repr. 36.

12. MORTGAGE. [*Foreclosure—Laches.*]—*When Defense of Laches Unavailing, Though Twenty Years have Elapsed.*—In a proceeding to foreclose a mortgage in chancery, where no excuse is shown in the bill for allowing more than twenty years to elapse before bringing suit, objection to such failure cannot be urged at the hearing upon pleadings and proofs, if the evidence shows that the action is not in fact barred. [In the opinion of the court it is said by Champlin, J.: "The suit was commenced October, 1883. Attention is called by defendant's counsel to the face of the bill; that it does not set out any payments as having been made on the note and mortgage; and that it appears to be an attempt to foreclose a mortgage that became due April 16, 1861, without showing any excuse for the laches; and counsel claims that the bill shows no equity that entitles complainant to the relief prayed. In support of this position he cites the following cases: Hurlbut v. Britain, 2 Doug. (Mich.) 191; McLean v. Barton, Har. Ch. 279; Campau v. Chene, 1 Mich. 400; Reynolds v. Green, 10 Mich. 355; Ford v. Loomis, 33 Mich. 122. The case of Ford v. Loomis is not in point. The others are cases where the objection was taken by demurrer. In this case the objection is not raised by demurrer, but by answer, and the case is before us upon pleadings and proofs. Had the objection been taken by demurrer, the complainant would have been obliged to go out of court, or amend his bill showing that the suit was not barred by the laches of the holder of the mortgage, But the objection to the bill cannot be urged upon the hearing upon pleadings and proofs, if the proofs show that the action is not barred. Prior to 1879 there was no statute of limitations in force in this State applicable to mortgages upon real estate, and no conclusive presumption of payment, after a certain period had elapsed, existed by express legislative enactment. But courts of equity, following the analogies of the law, have refused relief in cases where it would have been barred at law by lapse of time. The bar is not, however, a legal, but an equitable one, and the presumption of payment may be rebutted by circumstances. Abbott v. Godfroys, 1 Mich. 179; Michigan Ins. Co. v. Brown, 11 Mich. 272; Curtis v. Goodenow, 24 Mich. 18; McKinney v. Miller, 19 Mich. 142; Baldwin v. Cullen, 51 Mich. 33; s. c., 16 N. W. Rep. 191. The evidence in this case shows conclusively that both mortgagor and mortgagee recognized the continued validity and force of the mortgage debt." The court then proceeded to show that the evidence rebutted the presumption of payment of the mortgage debt, and affirmed a decree of foreclosure.] *Baent v. Kennicutt*, S. C. Mich., June 10, 1885; 23 N. W. Repr. 808.

13. ———. [*Recording—Assignment for Creditors*] —*Unrecorded Mortgage good Against Subsequent Assignment for Creditors.*—In Rhode Island an unrecorded mortgage of chattels is good as against a subsequent assignment for creditors, the assignee having no higher right than his assignor had. [In the opinion of the court, by Durfee, C. J., it is said: "The creditors contend that they are entitled to the fund, because the mortgage, being unrecorded, is valid only between the parties to it. The creditors, however, show no right to the fund which they can enforce in this case, unless they are entitled to it under the assignment; and the question, therefore, is whether the assignee, as trustee for them, has acquired a right which is superior to the mortgage, or has simply succeeded to the right of his assignor which is subject to it. There can be no doubt that, ordinarily, where there is no statute to add to the effect of the assignment, a voluntary assignee succeeds simply to the right of the assignor. The cases to this effect are numerous, and have always been regarded as law by this court. Williams v. Windsor, 12 R. I. 9; Gardner v. Commercial National Bank, 13 id. 155, 173; Bridgford v. Barbour, 80 Ky. 529; Housel v. Cremer, 13 Neb. 298; Heinrichs v. Woods, 7 Mo. App. 236. The statute (Pub. Stat. R. I., chap. 237, § 15) alters the law to some extent, but not so as to affect this case. If the fund belongs to the creditors, it belongs to them under Pub. Stat. R. I., chap. 176, § 9, which declares that "no mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the said mortgage be recorded," etc. Under this provision, taken literally, the mortgagee can have no claim under the mortgage against any person but the mortgagor. The statute, however, must receive a reasonable construction. We do not suppose anybody would seriously assert that the mortgage, because unrecorded, would be invalid against a mere donee. In Pratt v. Harlow, 16 Gray. 379, it was held, under a statute like ours, that the mortgagee could maintain trover against a mere stranger or intruder tortiously converting the mortgaged chattel. But how, after demand, is the assignee, if he simply succeeds to the right of the mortgagor, in any better position? In this case we should be very glad to yield to the authority of some of the cases cited for the creditors, if we could consistently; but we have reluctantly come to the conclusion that the mortgage is good as against the assignee, the assignee having no better right than the assignor. Hawks v. Pritslaff, 51 Wis. 160; Wakeman v. Barrows, 41 Mich. 363. If the assignment were made subject to the mortgage, no one would say that the assignee could hold against the mortgage. As we construe it, it is in legal effect made subject to the mortgage. Indeed, the assignment purports to be only an assignment of 'all my state and property,' etc., in general terms. It does not specifically convey the assignor's stock in trade. It may be doubted even whether an assignee for value under such an assignment would not take subject to the mortgage. Adams v. Cuddy, 13 Pick. 460; Chaffin v. Chaffin, 4 Gray, 280; Cook v. Farrington, 10 id. 70; Jamaica Pond Aqueduct Corp. v. Chandler, 9 Allen. 159. We conclude, therefore, that the mortgagee must have the fund, but considering that his neglect has been the cause of the difficulty, let it be without costs from the creditors and subject to the further costs of the case." The learned editor of the *Eastern Reporter* cites Bish. Insolv. Debtor (2nd ed.) § 276.] *Wilson v. Esten*, S. C. R. I., Jan. 24, 1885; 1 Eastern Repr. 42.

14. PUBLIC LANDS. [*Pre-Emption.*]—*When Heirs not Allowed to Control Patent.*—One in the occu-

pation of unsurveyed lands of the United States, for pre-emption of which he has taken none of the steps required by the pre-emption laws, has a mere privilege of pre-emption, which is neither a title, legal or equitable. Until there is an offer to do what the pre-emption laws requires to be done to initiate and prosecute a pre-emption right, there is no existing claim of the settler to pre-empt, which can be completed after his death, by his heirs or administrator, under § 2,269 of the United States Revised Statutes; and if no such claim was initiated and prosecuted by him in his lifetime, he acquired no proprietary interest in the land, which, upon his death, would descend to his heirs, and clothe them with an equitable right to control the the patent to the land subsequently issued by the United States upon an entry made by another. [Citing Grand Gulf R. Co. v. Bryan. 8 S. & M. 268; Hutton v. Frisbie, 37 Cal. 475; Frisbie v. Whitney, 9 Wall. 187; The Yosemite Valley Case, 15 Wall. 77.] *Buxton v. Traver*, S. C. Cal., June 25, 1885; 6 W. C. Repr. 852.

15. RAILWAY COMPANIES.—*Duty not to Impair Drainage of Adjacent Lands.*—A railway company must so build its road-bed as not to impair the drainage of the land over which it passes, and must construct necessary cattle-guards and crossings under penalty of paying damages for injuries caused by its omissions. The failure to stipulate in the donation of the right of way that cattle-guards and crossings must be provided does not deprive the donors from recovering for injury caused by the want of them. They are incidents of railroad building. The company must build them for its own protection. *Heath v. T. & P. R. Co.*, S. C. of La., Opelousas, July, 1885.

16. RECEIVER. [*Assignment-Patent Right*].—*Court will order Assignment of Patent Right to Receiver.*—A receiver of an insolvent debtor, appointed under Pub. Stat. R. I., Chap. 237, § 13, is entitled to a patent right belonging to the debtor, and the court may order the debtor to assign the same to the receiver. [Citing Ashcroft v. Walworth, 1 Holmes, 152; Ager v. Murray, 105 U. S. 126.] *Keach v. Chadwick*, S. C. R. I., Dec. 2, 1884; 1 Eastern Repr. 17.

17. REDEMPTION. [*Limitation.*]—*Bill to Redeem Chattles Barred in Six Years.*—A bill to redeem chattels which have been forfeited under a mortgage is barred in six years, by analogy to the statute of limitations. [In the opinion of the court by Durfee, C. J., it is said: "The complainant contends that the right in equity continues indefinitely unless the mortgage is foreclosed by sale or otherwise. This view may be supported by a few *dicta*, but the general current of decision is against it. Undoubtedly the right in equity will continue as long as the mortgage continues to recognize the mortgage as subsisting; but when the mortgagee, having possession, ceases, after default, to recognize the mortgage as subsisting and deals with the property as his own, it is, according to the great preponderance of authority, for the mortgagor, if he wishes to redeem, to bring his suit to redeem within a reasonable time. As to what is a reasonable time, the cases are not very clear. Mr. Jones, in his treatise on Chattel Mortgages, says that 'reasonable time may well be determined by analogy to the statute of limitations applicable to actions at law for the recovery of personal property.' Jones on Chat. Mortg., § 687. The time within which a real property mortgage may be redeemed is limited to twenty years, after the mortgagee in possession ceases to recognize the mortgage as subsisting, from analogy to the statute of possession. If in like manner we determine the time for chattel mortgages from analogy to the statute of limitations of personal actions, the right to redeem will cease at the expiration of six years. This has been adopted as the rule in Alabama (Humphres v. Terrell, 1 Ala. 650; Byrd v. McDaniel, 33 Id. 18); and is recognized as a proper rule in Missouri. Perry v. Craig, 3 Mo. 516. Evidently twenty years is unreasonably long; for personal property is not permanent and indestructible like real estate, but ordinarily it is movable, liable to be lost, perishable from use or time, and even when it consists of shares of stock, subject to great fluctuations in value. If six years is long enough for an action at law, when personal property belonging to one person has been appropriated by another, we see no reason why, in the absence of fraud or some other special ground of equitable relief, six years is not likewise long enough for the institution of a suit to redeem a chattel mortgage, when the mortgagee in possession, having an absolute title at law, ceases to recognize any right in the mortgagor and treats the property as his own."] *Greene v. Dispeau*, S. C. R. I., Dec. 20, 1884; 1 Eastern Repr. 19.

18. SALE OF PERSONAL PROPERTY. [*By Sample.*] *When Sale Regarded as a Sale by Inspection, and not by Sample.*—"A sale of grain or other commodity in bulk cannot be regarded as a sale by sample, simply because a portion only is exposed to view; if the bulk is thrown open to inspection, the buyer is considered to have inspected the bulk, and not to have relied upon that only which is exposed to view as a sample; the intention of the parties in such case is to sell by inspection, not by sample." *Selser v. Roberts*, S. C. Pa., Oct. 6, 1884; opinion of the court by Clark, J.; 15 Pittsb. Leg. Jour. (N. S.) 346.

19. ———. ———. [*Implied Warranty.*]—*No Implied Warranty in Case of Sales by Sample.*—A sale of chattels by the production of a sample, without fraud or other circumstances fixing the character of the sample as a standard of quality, does not imply any warranty of quality. [In the opinion of the court Clark, J., says: "It is certainly settled in a long line of cases in Pennsylvania, that a sale of chattels by the production of a sample, without fraud or other circumstances fixing the character of the sample as a standard of quality, does not imply any warranty of quality. Differ as we may as to the policy or propriety of such a principle, we cannot deny that it is now recognized as the settled law of this State. Bowkins v. Bevan, 3 Rawle, 23; Jennings v. Gratz, Id. 169; Fraley v. Beckham, 10 Barr, 320; Whittaker v. Eastwick, 25 P. F. Smith, 229; Boyd v. Wilson, 2 Norris, 319. The sample (as stated in the case last cited), under such circumstances, pure and simple, becomes a guaranty only that the article to be delivered shall follow its kind and be merchantable simply."] *Selser v. Roberts*, S. C. Pa., Oct. 6, 1884; 15 Pittsb. Leg. Jour. (N. S.) 346.

CORRESPONDENCE.

"A LEGAL PUZZLE."

To the Editor of the Central Law Journal:

The Tennessee Supreme Court agrees in theory, at least, with your position as defined in "A Legal Puzzle," 21 C. L. J. 120, that a man should be tried for the murder first, and, if convicted, hanged, and afterwards should serve his term for burglary.

In the last volume of our published decisions, 13 Lea (Tenn.) 228, in delivering the opinion in State v. Parker, Cooke, J., says that the judgment of imprisonment in the penitentiary for the felony should be first executed, and that after this had been done, the judgment on the misdemeanor could be executed, putting his decision on the identical ground occupied by the learned editor of the C. L. J.—"less opportunity of escaping before the execution of the more severe sentence." The two judgments were affirmed by the Supreme Court on the same day.

I have not been able to go into a search for authorities on the question asked in "A Legal Puzzle." but I know as a fact that there is now in the Tennessee State Prison one William Coats, a prisoner from this (Giles) county, serving a ten year term for an attempt to poison; and the same man stands indicted in the Giles County Circuit Court for a murder committed in our county jail while he was incarcerated there waiting his trial for the attempt to poison.

He was indicted for the murder soon after he had been carried to the State prison. There has never been the thought of trying him for the murder until after the expiration of his ten year sentence; but we have a provision in our code which says that, upon conviction of two or more offenses, imprisonment for one shall begin upon expiration of imprisonment for the other, Tenn. Code (T. & S.) § 5228, and this may bear on it.

FLOURNOY RIVERS.

Pulaski, Tenn.

ANOTHER ANSWER.

To the Editor of the Central Law Journal:

A partial answer to the "Legal Puzzle" in C. L. J. of August 7th, is in Kennedy v. Howard, 74 Ind. 87. Kennedy, while in the penitentiary, killed a convict. He was tried in the courts of the county in which the penitentiary was situated and remanded to the penitentiary for life. At the end of the term for which he was first sent he sought his release, but it was denied. On appeal the court said he, "while * * * there in prison * * * was as much amenable to the criminal law of the State as if he had been out of prison. And the court had jurisdiction of the offence, it having been committed within the body of Clark county (where the penitentiary was situated.) It cannot, as we think, be rightfully said, that while a person is undergoing imprisonment in the penitentiary, the proper court has no right or power to try him for an offense which he may commit while there imprisoned." A similar case was, we understand, before the Iowa Supreme Court; at least the writer of this, at his request, sent to the attorney-general of that State, the citation of this case.

In Sanders v. State, 85 Ind. 318; s. c. 4 Crim. L. Mag. 359 (also reported in American Reports) a plea of guilty was forced from the accused and he was sent to the penitentiary for life. Afterwards he filed a petition for a writ of error *coram nobis* in the court that sent him to the penitentiary. It was granted on appeal, and he was brought before the court, tried and convicted; and sent back to prison for life, his case being affirmed on appeal. Sanders v. State, 94 Ind. 147.

Crawfordsville, Ind. W. W. T.

STATUTORY BONDS WITH SUPERADDED CONDITIONS.

To the Editor of the Central Law Journal:

The learned editor is in error in his note (21 C. L. J. 110,) to the opinion of Lewis, P. J., 21 C. L. J. 108–110 in the case of the Rubelman Hardware Co. v. Greve, reported under the head of statutory bonds with additional undertakings when he says the cases cited are the only American ones bearing on the subject.

The question of the liability of sureties on bonds whose requirements are broader and on those whose requirements are more restricted, than the statute prescribes has come before the Tennessee Supreme Court several times.

"As to statutory bonds, superadded and distinct conditions, not imposed by the statute, may be rejected as illegal and the conditions required by the statute enforced." 2 Hump. 500; 1 Cald. 85; 4 Cald. 268; 4 Heisk. 550; 12 Heisk. 38; 4 Baxt. 440; 1 Lea, 511; 6 Lea, 155; 11 Lea, 228; 12 Lea, 314; 2 Tenn. Ch. 267 & 356. In Ranning v. Reeves, 2 Tenn. Ch. 267, the opinion is very explicit.

"If the bond require less than the statute prescribes it is good as far as it goes. Judgment to that extent may be rendered," but nothing can be added. 2 Yerg. 83, 321; 4 Yerg. 199, 496; 7 Yerg. 17, 91; 9 Yerg. 9; 4 Cald. 235; 11 Lea, 228.

There are also other Tennessee cases bearing more or less remotely on the question.

FLOURNOY RIVERS.

Pulaski, Tenn.

JETSAM AND FLOTSAM.

MICHIGAN'S NEW LAW OF LIBEL.—The Legislature of Michigan has recently passed the following statute:

SECTION 1. In any suit brought for the publication of a libel in any newspaper in this State the plaintiff shall recover only actual damages if it shall appear that the publication was made in good faith and did not involve a criminal charge; that its falsity was due to mistake or misapprehension of the facts, and that in the next regular issue of such newspaper after such mistake or misapprehension was brought to the knowledge of the publisher or publishers, whether before or after suit brought, a correction was published in as conspicuous a place in said newspaper as that occupied by the article sued on as libellous.

SEC. 2. In any action or suit for the publication of a libel in any newspaper in this State the plaintiff shall not be entitled to recover, in addition to actual damages, any greater sum than $5,000.

SEC. 3. The words "actual damages" in the foregoing section shall be construed to include all damages the plaintiff may show he has suffered in respect to his property, business, trade, profession or occupation, and no other damages.

AN ENTERPRISING LAWYER. — A press despatch says: "Lopez, an eminent member of the Roman bar, has been arrested on a charge of receiving stolen goods. About seven years ago the National Bank of Ancona was robbed of $40,000. One of the thieves was defended by Lopez, and on his conviction is alleged to have given the booty to the lawyer, on condition of Lopez taking $10,000 to himself and handing over the remainder to the prisoner's wife."